STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 16, 2010
v	No. 287459 Oakland Circuit Court
MARK SLAUGHTER, Defendant-Appellee.	LC No. 2007-218038-FH

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Defendant was charged with manufacturing 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(ii). The trial court granted defendant's motion to suppress the evidence and dismiss the case. Plaintiff now appeals as of right. We affirm.

I. Summary of Facts and Proceedings

On May 6, 2007, Kathleen Tunner went into her basement and saw water running down the wall and over the electrical box. She checked upstairs and could hear water running between the wall of her townhouse and the one next door. Tunner attempted to contact her next-door neighbor, whom she identified as defendant, by pounding on the door of the unit. Receiving no response, she contacted the management company to see if they had a key to get in or a telephone number to try and reach defendant. The management company told her there was nothing it could do, so she called the fire department.

Firefighters responded to the complex and, upon receiving no answer to their knocks on defendant's door, entered defendant's unit through an open window in order to investigate. While in the basement to turn off the water to defendant's unit, the firefighters noticed marijuana plants. The firefighters informed the police, who obtained and executed a warrant and seized the marijuana. After defendant was charged, he sought suppression of the evidence on the ground that the firefighters were improperly in his home in the first instance.

The trial court held an evidentiary hearing and made the following factual findings:

> Lt. Michael Schunck, of the Royal Oak Fire Department . . . was called to 3208 Coolidge, in the City of Royal Oak. The call was based upon a report of a possible electrical problem with running water. Upon arrival, he spoke to a

neighbor, who indicated she suspected water was running between a common wall, which shares an electrical panel. The witness attempted to make contact with the owner of the neighboring apartment, but was unsuccessful. If there was water running onto an electrical box, it presented a life hazard and structure fire situation. The witness made entry into the defendant's home to see if there was water running into the electrical box. Another firefighter climbed through the window and opened the door for the witness. The witness went into the apartment to check for running water, and shut off the electricity. It was possible . . . to shut off the water to the entire complex from outside, but the general practice is to shut off the individual apartment.

Upon cross-examination, the witness indicated he did not see or hear any water before or after entering the apartment. In fact, he admitted he did not find any running water in the apartment. The witness also admitted he did not shut off the water of the neighbor, nor did he check that apartment for water or dampness. He also admitted he did not turn off the electrical box for either apartment. The witness was not sure where the meter [was] which would have permitted him to shut off the electricity without entering the apartment.

Upon re-direct examination, the witness indicated he was not sure if he entered the neighbor's apartment. He also indicated he would have entered the apartment even if he had shut off the water and/or electrical from the outside. He testified he has to investigate the calls to the fullest extent possible, and he is [t]he agent for the City of Royal Oak based upon liability running to the City of Royal Oak.

Upon questioning by the Court, the witness indicated he did not attempt to check the neighbor's basement for dampness or water. He also testified he attempts to contact the owner by knocking on the door. Then he tried to check with the manager of the unit, and he was able to make contact. He testified the contact persons sometimes live great distances from the sites which they manage, and they typically wait only twenty to thirty minutes. He also indicated they did not ask for a telephone number in an attempt to reach the owner. The Court notes the witness failed to make any attempts to verify the information relayed by the neighbor prior to entering the home of the defendant. The witness did not attempt to hear or see for himself what was causing the problem, nor did he attempt to verify the existence of running water in the wall prior to entering the defendant's home.

The parties next placed their stipulation on the record to Ms. Tunner's testimony from the preliminary examination. Specifically, the defendant had left one hour prior to the incident, before she called the fire department, she had called the management who told her to call the fire department. She also testified she could hear the water rushing down the walls.

. . . The defendant testified the electrical meter boxes for the various units are located outside the units. He indicated how it is possible to disconnect the power from the outside without entering the unit. . . .

The trial court concluded that the community caretaker exception to the warrant requirement did not include "anything related to the investigation of a possible fire hazard" such that the firefighters needed a warrant to enter defendant's home. Therefore, because the firefighters had entered without a warrant, the trial court suppressed the evidence.

II. Standard of Review

We review a trial court's factual findings on a motion to suppress evidence for clear error, but review de novo the trial court's conclusions of law and ultimate decision regarding whether to suppress the evidence. *People v Murphy* (*On Remand*), 282 Mich App 571, 584; 766 NW2d 303 (2009).

III. Analysis

"The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures and provides that no warrants shall issue without probable cause." *People v Davis*, 442 Mich 1, 9; 497 NW2d 910 (1993). "Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions." *Id.* at 10 (quotation marks and citations omitted). For a search to be legal, the government must show that either it had a warrant, or that the actions taken fell within one of the recognized exceptions. *Id.* In the present case, the firefighters entered into defendant's house without a warrant. Therefore, the prosecution had to show that the firefighters conduct fell within an exception.

A. Exceptions

"A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze." *Michigan v Tyler*, 436 US 499, 509; 98 S Ct 1942; 56 L Ed 2d 486 (1978). Such a situation falls under the "exigent circumstances" exception. *Tyler, supra*; *Davis, supra* at 12.

Here, there was no report of smoke or fire and none was visible outside the building. We presume that had there been smoke or flame or some other indication of an actual fire, the prosecution would have argued exigent circumstances. The prosecution did not, however, argue exigent circumstances in this case, but instead argued that the firefighters were performing their duties under the "community caretaking"[1] exception to the warrant requirement.[2] However, the exception has only been defined in relation to police officers, not firefighters. See *Davis, supra*

[1] The community caretaking exception was established in *Cady v Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973) and recognized by the Michigan Supreme Court in *City of Troy v Ohlinger*, 438 Mich 477; 475 NW2d 54 (1991). It is not a subcategory of the exigent circumstances exception. *Davis, supra* at 24.

[2] Given that this issue is limited to whether the warrantless search was permissible under the community caretaking exception, we take no position as to whether the circumstances in this case would constitute exigent circumstances or any other exception to the warrant requirement.

at 24 ("The community caretaker exception is only invoked when the police are not engaged in crime-solving activities."). The trial court concluded that since the investigation of a possible fire hazard was not contained within the duties and functions that have been found to fall within the community caretaking exception, the exception was inapplicable.

B. Applicability of Community Caretaker Exception

We first consider whether the community caretaking exception is applicable to the investigation of a fire hazard. In order to answer this question, we must first determine what type of search is conducted when firefighters investigate a fire hazard. Our Supreme Court has adopted the United States Supreme Court's categorization of three types of searches: regulatory, administrative, and criminal investigation. *Tyler*, *supra* at 573-577. We conclude that the fire department's actions are best classified as an administrative search.

A regulatory search is one where "inspection is a 'crucial part of the regulatory scheme.'" *Id.* at 573. Such searches include "[u]nannounced prophylactic inspections by fire department officials of theatres, department stores and other places where large crowds gather [that] may be necessary to assure that unblocked exists and adequate fire extinguishers are maintained." *Id.* Warrants may not be required for this type of search "[I]n light of the public nature of the premises and the relative unintrusiveness of the inspection." *Id.* The search in the present case does not resemble this type.

A criminal investigation is one in which "officials seek evidence to be used against persons in a criminal prosecution." *Id.* at 576. Because of the nature of such searches, they require "warrants based on probable cause to believe that evidence of a crime will be found." We agree with plaintiff that the firefighters entered defendant's apartment to investigate a possible fire hazard, not to gather evidence for use against anyone.

An administrative search occurs when "an investigation is to determine the cause of a fire . . . and to prevent such fires from occurring or recurring." *Id.* at 574. Here, the firefighters entered into defendant's apartment to prevent a fire and investigate a possible fire hazard. Thus, we conclude that the firefighters actions are governed under the standard for an administrative search.

Given that administrative searches share a probable cause and warrant requirement with criminal investigation, they also share exceptions to the warrant requirement. *Tyler*, *supra* at 576 (recognizing that "exigent or other special circumstances" can avoid the warrant requirement for a search intended to determine the cause of a fire). As previously noted, one such exception is the community caretaking exception. *Davis*, *supra* at 11. Accordingly, we conclude that the community caretaking exception can apply to searches performed by firefighters to investigate a possible fire hazard.

C. Standard Applicable to Community Caretaking Exception

The next question is what standard this Court should use to evaluate actions undertaken in the capacity of community caretaking. Our Supreme Court had indicated that there is not necessarily a single standard for this exception:

> Community caretaking activities are varied and are performed for different reasons. Although, for example, an inventory of a car and entry into a dwelling may both be categorized as "caretaking functions," *it does not follow that both types of activities should be judged by the same standard*. It is particularly important to note that the levels of intrusion the police make while performing these functions are different. For example, a police inventory of a car is much less intrusive than a police entry into a dwelling. [*Davis*, *supra* at 25 (emphasis added).]

In *Davis*, our Supreme Court referenced a Wisconsin case that held that when police acted as part of their community caretaking function, their conduct "should be evaluated pursuant to a reasonableness standard." *Id*. at 22-23 n 10, citing *State v Bies*, 76 Wis 2d 457, 468; 251 NW2d 461 (1977). Because this standard is consistent with the related emergency aid exception, see *Davis*, *supra* at 26 (the police "may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance"), we adopt that standard as appropriate under the facts of this case.

D. Reasonableness of Firefighters' Actions

In this case, the firefighters entered defendant's residence in response to Tunner's report of hearing water running between the walls and noticing water running over her own electrical box. As an initial matter, we note that the trial court clearly erred in its findings of fact. Namely, the trial court concluded that the firefighters "went into the apartment to check for running water, and shut off the electricity." In fact, there was no testimony that the firefighters ever intended to attempt to shut off the electricity or that such action would have been appropriate, making this finding clearly erroneous. In addition, based on a lack of evidence regarding whether the firefighters did consider, would consider, or should have considered shutting off the electricity, the firefighters' lack of knowledge about where the meter was, the firefighters' failure to turn off the electricity at either unit, and defendant's testimony that the electricity could have been shut off from outside the unit was irrelevant.[3]

Nevertheless, the record does not establish whether the firefighters entered defendant's unit without first examining or attempting to remedy the situation at Tunner's unit. When questioned by the trial court whether they went "into Ms. Tunner's basement to check our her situation before you went next door," the firefighter replied, "I don't believe so. I can't remember." The trial court's opinion was more generous, noting that Schunck was "not sure if he entered [Tunner]'s apartment." Thus, the record permits the conclusion that the firefighters were simply too quick to enter into defendant's unit and failed to investigate the complaint.

[3] Even if defendant's testimony was relevant, we find its probative value to be substantially outweighed by its prejudice. Defendant testified only that based on his personal experience, he was able to shut off electricity from the meter outside some other residences. He testified that he had never attempted it at his apartment. There was no evidence that the meter at defendant's apartment would have worked the same way, or that the electric company permitted shutting off the electricity in such a manner, whether by the homeowner or the fire department.

We recognize that Schunck had previously testified that he believed the firefighters went into Tunner's apartment "because she tried to show us what was happening." Thus, it is possible that the firefighters did enter Tunner's apartment and found no water on the floor, no damp walls, and heard no water running, but still needed to examine defendant's apartment in case the water Tunner had previously heard running had caused an electrical short that might have started a fire. It is also possible that Tunner shut off her own water supply and dried her basement to avoid any hazard, which could explain why there was no initial investigation into her unit or, if there was, why they found no wet walls or floors. These possible alternatives, however, are no more or less likely than that the firefighters failed to investigate prior to entering defendant's apartment.

The dissent concludes the firefighters acted reasonably because Schunck testified that they would have entered defendant's apartment even if they had been able to turn off the water from outside the building. However, this is not the same as testifying that they would have entered defendant's apartment regardless of whether they had first investigated and remedied the situation in Tunner's apartment. There is simply no testimony from the firefighters whether, if they been able to resolve the situation in Tunner's apartment, it would have been necessary to enter defendant's apartment or whether, under circumstances such as this, they would check out the neighboring apartment regardless of what they found Tunner's apartment. Thus, based on the record, it is unclear whether, if the firefighters had gone into Tunner's home, it would have been necessary to go into defendant's home. Accordingly, there are too many outstanding questions to conclude whether the firefighters acted reasonably. We emphasize that we have *not* concluded that the firefighters acted unreasonably in this case. Rather, we conclude that the prosecution simply failed to place sufficient evidence in the record to show the reasonableness of the firefighters' actions. Accordingly, the trial court properly granted the motion to suppress.

Affirmed.

/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro